

No. 465

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

J. D. OSBORN,

Plaintiff in Error.

vs.

CHARLES ALTSCHUL,

Defendant in Error.

TRANSCRIPT OF RECORD.

In Error to the Circuit Court of the United States
for the District of Oregon.

FILED
AUG 20 1898

INDEX.

	Page.
Amended Answer	14
Answer	7
Assignment of Errors.....	34
Bond on Writ of Error	43

*Records of District
Court of Appeals*

89

Order Fixing Amount of Bond	42
Order Setting Cause for Trial	19
Order Setting Motion to Amend Verdict for Hearing.....	27
Order Staying Execution	24
Order Sustaining Demurrer to Answer	13
Order to Amend Verdict	28
Petition for Writ of Error	33
Record of Trial	20
Reply to Amended Answer	17
Stipulation as to Damages	1
Trial (continued)	21
Trial (continued)	22
Verdict	22
Writ of Error	3

INDEX.

	Page.
Amended Answer	14
Answer	7
Assignment of Errors	34
Bond on Writ of Error	43
Citation on Writ of Error	2
Clerk's Certificate to Transcript	45
Complaint	5
Cost Bill	31
Demurrer to Answer	12
Judgment	30
Motion for New Trial	23
Motion to Amend Verdict	26
Notice to Set Motion for Hearing	25
Order Denying Motion for New Trial	28
Order Extending Time to Submit Bill of Exceptions	29
Order Fixing Amount of Bond	42
Order Setting Cause for Trial	19
Order Setting Motion to Amend Verdict for Hearing	27
Order Staying Execution	24
Order Sustaining Demurrer to Answer	13
Order to Amend Verdict	28
Petition for Writ of Error	33
Record of Trial	20
Reply to Amended Answer	17
Stipulation as to Damages	1
Trial (continued)	21
Trial (continued)	22
Verdict	22
Writ of Error	3

*In the United States Circuit Court of Appeals for the Ninth
Circuit.*

J. D. OSBORN,
Defendant and Plaintiff in Error, }
vs. }
CHARLES ALTSCHUL,
Plaintiff and Defendant in Error. }

Stipulation as to Damages.

It is hereby stipulated, by and between the parties to the above-entitled cause, that on the trial of said cause in the Circuit Court of the United States for the District of Oregon, the claim of the plaintiff, as set forth in his complaint, for damages for the detention of the land described in said complaint, was waived and abandoned; and that no testimony has been offered or introduced in said cause relative to said damages, or any damages for the detention of said land by the said J. D. Osborn, but there was testimony offered in support of the issues respectively made by the plaintiff and defendant, except as to damages as above stated.

S. T. JEFFREYS,

One of the Attorneys for Plaintiff in Error.

WILLIAMS, WOOD & LINTHICUM,

Attorneys for Defendant in Error.

[Endorsed]: Filed June 13th, 1898. F. D. Monckton,
Clerk. By Meredith Sawyer, Deputy Clerk.

Citation on Writ of Error.

United States of America, }
 District of Oregon. } ss.

To Charles Altschul, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Oregon, wherein J. D. Osborn, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this March 11th, 1898.

WM. B. GILBERT,
 Circuit Judge.

Due service of the within citation on writ of error is hereby accepted at Portland, Oregon, this 17 day of March, 1898.

WILLIAMS, WOOD & LINTHICUM,
 Attorneys for Defendant in Error.

[Endorsed]: Filed March 13, 1898. J. A. Sladen,
 Clerk. By G. H. Marsh, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

J. D. OSBORN,

Plaintiff in Error,

vs.

CHARLES ALTSCHUL,

Defendant in Error.

Writ of Error.

The United States of America—ss.

The President of the United States of America, to the Judges of the Circuit Court of the United States for the District of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court before the Honorable Charles B. Bellinger, one of you, between Charles Altschul, plaintiff and defendant in error, and J. D. Osborn, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit together with this writ, so that you

have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this March 30, 1898.

[Seal]

J. A. SLADEN,

Clerk of the Circuit Court of the United States for the District of Oregon.

By G. H. Marsh,
Deputy Clerk.

[Endorsed]: Filed March 30, 1898. J. A. Sladen, Clerk U. S. Circuit Court, District of Oregon. By G. H. Marsh, Deputy Clerk.

In the Circuit Court of the United States for the District of Oregon.

October Term, 1896.

Be it remembered, that on the 31st day of December, 1896, there was duly filed in the Circuit Court of the United States for the District of Oregon, a complaint, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

CHARLES ALTSCHUL,

Plaintiff,

vs.

J. D. OSBORN,

Defendant.

Complaint.

The above-named plaintiff complains of the above-named defendant, and for cause of action alleges as follows:

Plaintiff is a citizen of the State of California, and resident therein.

Defendant is a citizen of the State of Oregon, and resident therein.

Plaintiff is the owner in fee simple and entitled to the immediate possession of the following described land, situate in the county of Malheur and State of Oregon, to-wit: The north half of section one, in township nineteen, south of range forty-three, east of the Willamette Meridian.

Defendant, without any right of title, has entered into and upon its said land, and is now upon said land, and wrongfully withholds the possession thereof from plaintiff, to plaintiff's damage in the sum of thirty-five hundred dollars.

The value of said land is more than two thousand dollars, to-wit, thirty-five hundred dollars.

Wherefore, plaintiff demands judgment against defendant for the restitution of said premises above described, and for the sum of thirty-five hundred dollars for the wrongful withholding thereof from plaintiff, and for his costs and disbursements herein.

WILLIAMS, WOOD & LINTHICUM,
Attorneys for Plaintiff.

United States of America, }
State and District of Oregon, } ss.
County of Multnomah. }

I, C. E. S. Wood, being first duly sworn, on my oath say that I am one of the attorneys for Charles Altschul, the plaintiff named in the foregoing complaint; that said plaintiff is not now within the State of Oregon, which is the reason why I make this verification; and that said complaint is true as I verily believe.

C. E. S. WOOD.

Subscribed and sworn to before me this 31st day of December, 1896.

[Seal]

H. H. PARKER,
Notary Public in and for Oregon.

Filed December 31, 1896. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 27th day of February, 1897, there was duly filed in said court an answer, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

CHARLES ALTSCHUL,

vs.

J. D. OSBORN,

Defendant.



Answer.

Defendant above named, for answer to plaintiff's complaint, denies and alleges as follows:

Denies that plaintiff is the owner in fee simple or otherwise of the north half of section one, in township nineteen south, range forty-three east of Willamette meridian, in Malheur County, Oregon, or any portion thereof.

Denies that the plaintiff is entitled to the immediate or any possession of said land or any portion thereof.

Denies that defendant, without right and title or either thereof, entered into and upon the said land or any portion thereof.

Denies that defendant wrongfully withholds the possession of said land, or any portion thereof, from the plaintiff.

Denies that defendant is now, or ever has been, upon said land, or any portion thereof except the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section one, in town-

ship nineteen south, range forty-three east of the Willamette Meridian, in Malheur County, Oregon.

Denies that defendant has damaged plaintiff by such possession, or otherwise, in the sum of thirty-five hundred dollars, or in any other sum or amount whatever.

Deny that the value of said land is thirty-five hundred or any greater sum than \$1,000.00.

As a further and separate defense, defendant alleges: That during all the times herein mentioned, defendant and his predecessors in interest were, and now are, citizens of the United States, and qualified to enter and hold public lands under the laws of the United States.

That the defendant is now, and for a long time hitherto has been, the owner in fee and in the possession of that certain piece and parcel of land situated, lying, and being in said Malheur County, State of Oregon, and described as follows:

The E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section one (1), township nineteen (19) south, range forty-three (43) east of the Willamette Meridian, being a portion of the land referred to in plaintiff's complaint.

That the defendant has had and held open, notorious, and exclusive possession of the said premises adversely to the plaintiff and all other persons whomsoever, at all times since the day of October, 1870, and continues so to hold.

That plaintiff wrongfully claims and asserts an interest in and to said premises adverse to defendant; and the said claim is without right; and plaintiff has not any estate, right, title, or interest whatever in said land or premises, nor any portion thereof, and that plaintiff has

not been siesed nor possessed of said premises, or any portion thereof, within a period of more than ten years last past before the commencement of this action, to-wit, twenty-six years.

As a second further and separate defense, defendant alleges: That during all the times herein mentioned, defendant and his predecessors in interest were, and now are, citizens of the United States, qualified to enter and hold public lands under the land laws of the United States.

That at all times since the day of October, 1870, the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section one (1), township nineteen (19) south, range forty-three (43) east of the Willamette Meridian, being a portion of the lands described in plaintiff's complaint, have been, and still are, occupied by bona fide settlers, who were qualified during all of said times to enter and to hold public lands under the homestead and pre-emption laws of the United States; and said bona fide settlers, during all of said time, occupied said land in good faith, and fully intended to enter the same under the laws of the United States.

That on the day of , 1890, the defendant, who was at that time and at all times herein mentioned, a citizen of the United States, and qualified to enter and to hold public land under the land laws of the United States, attempted to file a homestead on said premises last above described, by sending the proper homestead application to the local land office, but that said application was rejected by the land department, and is still rejected and denied, for the reason that said lands had

been already patented to the defendant's grantor, the Willamette Valley and Cascade Mountain Wagon Road Company, on the 30th day of October, 1882.

That said lands are within the limits of the grant, made by act of Congress of July 5, 1866, to the State of Oregon, for the benefit of the Willamette Valley and Cascade Mountain Wagon Road Company, being an act entitled "An Act granting lands to the State of Oregon, to aid in the construction of a military road from Albany, Oregon, to the eastern boundary of said State."

That during all the times herein mentioned said lands were free and unappropriated lands of the United States, except by said bona fide settlers above referred to as occupying the same.

That said settlement by said bona fide settlers and application to file thereon excepted the said lands from the operation of the said grant to the said Willamette Valley and Cascade Mountain Wagon Road Company.

That acting upon the belief that the said road company would not select nor claim said premises at any time, defendant and his predecessors in interest made valuable improvements on said premises to the amount of \$1,250.

That said improvements were made prior to the selection and patenting of the said land to the said company.

Wherefore, defendant prays that he go hence without day; that defendant be adjudged to be the owner in fee of said premises; that it be adjudged that plaintiff holds the patent for said lands in trust for defendant, and that plaintiff be adjudged to have no interest or estate whatever in said lands, and be debarred forever from asserting any claim whatever in or to said premises adverse to

defendant; and for defendant's costs and disbursements herein.

WILL R. KING.
F. M. SAXTON.

State of Oregon, }
County of Baker. } ss.

I, J. D. Osborn, being first duly sworn, depose and say that I am the defendant above named; that I have read the foregoing answer, and that the same is true as I verily believe.

J. D. OSBORN.

Subscribed and sworn to before me this 28th day of January, 1897.

[Seal].

F. M. SAXTON,
Notary Public for Oregon.

Filed February 27, 1897. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 3d day of March, 1897, there was duly filed in said court a demurrer to second separate answer and defense, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

CHARLES ALTSCHUL,

vs.

J. D. OSBORN,

Plaintiff, }
No. 2,369.
April 7, 1897.
Defendant. }

Demurrer to Answer.

Now comes the above-named plaintiff, and demurrs to the second separate answer and defense contained in the above-named defendant's answer heretofore filed herein, and to the whole of said second separate answer and defense; and for ground of demurrer alleges that said second separate answer and defense does not state facts sufficient to constitute a defense to plaintiff's complaint herein.

WILLIAMS, WOOD & LINTHICUM,
Attorneys for Plaintiff.

I, C. E. S. Wood, of counsel for the above-named plaintiff, do hereby certify that in my opinion the foregoing demurrer is well founded in law.

C. E. S. WOOD,
Of Counsel for Plaintiff.

Filed March 3d, 1897. J. A. Sladen, Clerk.

And afterwards, to-wit, on Wednesday, the 7th day of April, 1897, the same being the 157th judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

CHARLES ALTSCHUL,	}	No. 2,369.
vs.		
J. D. OSBORN,		

Order Sustaining Demurrer to Answer.

This cause coming on to be heard upon the demurrer to the *first* separate answer and defense, and the court having heard Mr. C. E. S. Wood, of counsel for the plaintiff, in support of said demurrer, and Mr. W. R. King and Mr. S. T. Jeffreys, of counsel for the defendant, in opposition thereto, and being fully advised in the premises, it is hereby ordered that said demurrer be, and it is hereby, sustained, with leave to the defendant to file an amended answer hereto within ten days from this date.

And afterwards, to-wit, on the 7th day of April, 1897, there was duly filed in said court an amended answer, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

CHARLES ALTSCHUL,

Plaintiff,

vs.

J. D. OSBORN,

Defendant.

Amended Answer.

Defendant above-named, for amended answer to plaintiff's complaint, denies and alleges as follows:

Denies that plaintiff is the owner in fee simple or otherwise of the north half of section one, in township nineteen south, range forty-three east of the Willamette Meridian, in Malheur County, Oregon, or any portion thereof.

Denies that the plaintiff is entitled to the immediate or any possession of said land, or any portion thereof.

Denies that defendant, without right and title, or either thereof, entered into and upon the said land or any portion thereof.

Denies that defendant wrongfully withholds the possession of said land, or any portion thereof, from the plaintiff.

Denies that defendant is now, or ever has been, upon said land, or any portion thereof except the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section one, in township nineteen south, range forty-three east of the Willamette Meridian, in Malheur County, Oregon.

Denies that defendant has damaged plaintiff by such possession, or otherwise, in the sum of thirty-five hundred dollars, or in any other sum or amount whatever.

Deny that the value of said land is thirty-five hundred, or any other greater sum than \$1,000.00.

As a further and separate defense, defendant alleges: That during all the times herein mentioned, defendant and his predecessors in interest were, and now are, citizens of the United States, and qualified to enter and hold public lands under the laws of the United States and of the State of Oregon.

That on the day of October, 1870, defendant became the owner, by purchase, of the E $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section one, township 19 south, range 43 east of the Willamette Meridian, being a portion of the land described in plaintiff's complaint.

That the defendant is now, and for more than ten years last past prior to the commencement of this action has been, the owner in fee, and in possession of the lands last above described.

That defendant and his grantors and predecessors in interest have held actual, open, notorious, continuous, adverse, and exclusive possession to plaintiff and plaintiff's grantors and predecessors in interest, of said lands last above described, under claim of ownership and color of title, at all times since the day of October, 1870, and continues so to hold the same.

That plaintiff wrongfully claims and asserts an interest to said premises, adversely to defendant, and the said claim is without right, and plaintiff has not any estate, right, title or interest whatever in said land or premises, nor any portion thereof, and the plaintiff has not been seised nor possessed of said premises nor any portion thereof within a period of more than ten years last past,

before the commencement of this action, to-wit, twenty-six years; and plaintiff is barred by the statute of limitations from asserting any claim thereto.

Wherefore, defendant prays that he may go hence without date, and that he be adjudged the owner in fee of said premises, and entitled to the possession thereof.

That plaintiff be adjudged to have no estate nor interest whatever in or to said lands, and barred forever from asserting any claim whatever in or to said premises adversely to defendants, or either thereto, and for defendant's costs and disbursements in this action.

WILL R. KING,
F. M. SAXTON,
S. T. JEFFREYS,
Attorneys for Defendant.

Due service of the foregoing amended answer accepted at Portland, Oregon, this, the 6th day of April, 1897, by copy, and the filing of the foregoing amended answer assented to by plaintiff, and verification thereof waived.

WILLIAMS, WOOD & LINTHICUM,
Attorneys for Plaintiff.

Filed April 7th, 1897. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 21st day of April, 1897, there was duly filed in said court a reply to amended answer, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

CHARLES ALTSCHUL,

Plaintiff,

vs.

J. D. OSBORN,

Defendant.

Reply to Amended Answer.

Now comes the above-named plaintiff and for reply to defendant's amended answer herein.

Denies that on the day of October, 1870, or at any time, defendant became the owner, by purchase, of the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section one, township 19 south, range 43 east of the Willamette Meridian, being a portion of the land described in the plaintiff's complaint.

Denies that the defendant now is, or for more than ten years last past, prior to the commencement of this action has been, the owner in fee and in possession of the lands last above described.

Denies that defendant and his grantors and predecessors in interest have held actual, open, notorious, continuous, adverse, or exclusive possession to plaintiff and plaintiff's grantors and predecessors in interest, of said lands last above described, under claim of ownership and color of title, at all times since the day of October, 1870, or at all or continues so to hold the same.

Denies that plaintiff wrongfully claims and asserts an interest to said premises, adversely to defendant, or that

the said claim is without right; and denies that plaintiff has not any estate, right, title, or interest whatever in said land or premises, nor any portion thereof; and denies that plaintiff has not been seised nor possessed of said premises or any portion thereof within a period of more than ten years last past, before the commencement of this action, to-wit, twenty-six years; and denies that plaintiff is barred by the statute of limitations from asserting any claim thereto.

Wherefore, plaintiff prays as in his complaint herein.

WILLIAMS, WOOD & LINTHICUM,

Attorneys for Plaintiff.

United States of America,	}	ss.
District of Oregon.		
County of Multnomah,		
State of Oregon.		

I, C. E. S. Wood, being first duly sworn, say that I am one of the attorneys for the plaintiff, Charles Altschul, herein, and that the above and foregoing reply to defendant's amended answer is true, as I verily believe; and that I make this verification for the reason that said plaintiff is not now within this State or District.

C. E. S. WOOD,

Subscribed and sworn to before me this 19th day of April, 1897.

[Seal]

ALBERT E. GEBHARDT,
Notary Public in and for Oregon.

Filed April 21, 1897. J. A. Sladen, Clerk.

And afterwards, to-wit, on Tuesday, the 16th day of November, 1897, the same being the 38th judicial day of

the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

CHARLES ALTSCHUL,	}	No. 2,369.
vs.		
J. D. OSBORN.	}	November 16, 1897.

Order Setting Cause for Trial.

Now, at this day, comes the defendant by Mr. S. T. Jeffreys, of counsel, and thereupon it is ordered that the trial of this cause be, and the same is hereby, set for Friday, December 24, 1897.

And afterwards, to-wit, on Monday, the 27th day of December, 1897, the same being the 72d judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

CHARLES ALTSCHUL,	}	No. 2,369.
vs.		
J. D. OSBORN.	}	December 27, 1897.

Record of Trial.

Now, at this day, comes the plaintiff by Mr. C. E. S. Wood, of counsel, and the defendant by Mr. S. T. Jeffreys and Mr. W. R. King, of counsel, and thereupon, upon oral stipulation of the parties in both cases, made in open court, it is ordered that the above-entitled cause, and No. 2,350, Charles Altschul vs. Francis O'Neill, be tried before the same jury at the same time, said jury to return into court a separate verdict in each case.

And this being the day set for the trial of this case, now come the following named jurors to try the issues joined, viz: Henry Edwards, J. B. Noe, John Iler, Wm. S. Failing, Bennet Pearson, Samuel Ferguson, C. V. Kuykendall, J. J. Cooke, R. W. Fisher, James W. Roots, E. D. Garn, and Bernard Logsdon, twelve good and lawful men of the District, who, being accepted by both parties, duly impaneled and sworn, proceed to hear the evidence adduced, and the hour of adjournment having arrived, the further trial of this cause is continued until to-morrow, Tuesday, December 28, 1897, at 10 o'clock A. M.

And afterwards, to-wit, on Tuesday, the 28th day of December, 1897, the same being the 73d judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

*In the Circuit Court of the United States for the District of
Oregon.*

CHARLES ALTSCHUL,	}	No. 2,369.
vs.		December 28, 1897.
J. D. OSBORN,		

Trial (Continued).

Now, at this day, come the parties hereto by their counsel as of yesterday, and the jury impaneled herein being present and answering to their names, the trial of this cause was resumed. And the jury having heard the evidence adduced, the arguments of counsel, and the charge of the court, and having been instructed by the court to return into court a sealed verdict, retire from the courtroom in charge of proper sworn officers, to consider of their verdict.

And afterwards, to-wit, on Wednesday, the 29th day of December, 1897, the same being the 74th judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

*In the Circuit Court of the United States for the District of
Oregon.*

CHARLES ALTSCHUL,	}	No. 2,369.
vs.		December 29, 1897,
J. D. OSBORN,		

Trial (Continued).

Now, at this day, come the parties hereto by their counsel as of yesterday, and the jury impaneled herein being present and answering to their names, return into court the following verdict, to-wit: "We, the duly impaneled jury in the above-entitled action, find a verdict for the plaintiff, C. V. Kuykendall, Foreman," which verdict is received by the court and ordered to be filed.

And afterwards, to-wit, on the 29th day of December, 1897, there was duly filed in said court a verdict, in words and figures as follows, to-wit:

In the Circuit Court of the United States, for the District of Oregon.

CHARLES ALTSCHUL,)
 vs.)
 J. D. OSBORN,)

Verdict.

We, the duly impaneled jury in the above-entitled action, find a verdict for the plaintiff.

C. V. KUYKENDALL,
 Foreman.

Filed Dec. 29, 1897. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 5th day of January, 1898, there was duly filed in said court a motion in arrest of judgment, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

CHARLES ALTSCHUL,

Plaintiff.

vs.

J. D. OSBORN,

Defendant.

Motion for New Trial.

Comes now the defendant by his attorneys of record and moves the court for an arrest of judgment, and that the verdict in the above-entitled cause be set aside and a new trial granted, for the following causes materially affecting the substantial rights of the defendant:

1. The verdict of the jury in the above-entitled cause is uncertain, irregular, insufficient, and does not determine the issues in the case.
2. Insufficient evidence to justify the verdict.

KING & SAXTON and S. T. JEFFREYS,

Attorneys for Defendant.

The time of the hearing of this motion is hereby fixed at the convening of the court on the 7th day of January, 1898.

Due service of the within motion is hereby accepted in Multnomah County, Oregon, this 4th day of January, 1898,

by receiving a copy thereof, duly certified to as such by Will R. King, of attorney for defendant.

C. E. S. WOOD,

Of Attorney for Plaintiff.

Filed January 5, 1898: J. A. Sladen, Clerk.

And afterwards, to-wit, on Wednesday, the 5th day of January, 1898, the same being the 80th judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

CHARLES ALTSCHUL,

vs.

J. D. OSBORN,

Plaintiff,

Defendant.)

No. 2,369.

Jan. 5, 1898.

Order Staying Execution.

Now, at this day, on motion of Mr. Will R. King, of counsel for the defendant herein, it is ordered that said defendant be, and he is hereby, granted a stay of execution in this cause until the decision of the court be had upon a motion for a new trial herein.

And afterwards, to-wit, on the 7th day of January, 1898, there was duly filed in said court a motion to amend verdict and notice to set motion for hearing, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

CHARLES ALTSCHUL,

Plaintiff,

vs.

J. D. OSBORN,

Defendant.

Notice to Set Motion for Hearing.

To J. D. Osborn, the above-named defendant, and to S. T. Jeffreys and Will R. King, his attorneys of record.

Please take notice that on Monday, January 10, 1898, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, application will be made to the court, in the above-entitled cause, for a hearing on the motion hereto attached.

WILLIAMS, WOOD & LINTHICUM,

Attorneys for Plaintiff.

CHARLES ALTSCHUL,

Plaintiff,

vs.

J. D. OSBORN,

Defendant.

Motion to Amend Verdict.

The above-named plaintiff by his attorney moves the court for an order *nunc pro tunc* to amend the verdict in the above-entitled cause to conform to the issues made by the pleadings, the evidence, and the manifest intention of the jury, so that it shall read as follows:

“We the jury in the above-entitled cause, find that the plaintiff is the owner in fee simple and entitled to the immediate possession of the following described land, situate in the county of Malheur and State of Oregon, to-wit: The north half of section one, in township nineteen, south of range forty-three, east of the Willamette Meridian.”

WILLIAMS, WOOD & LINTHICUM,
Attorneys for Plaintiff.

Due service of the within motion and notice by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, Jan. 7th, 1898.

S. T. JEFFREYS,
One Attorney for Defendant.

Filed January 7, 1898. J. A. Sladen, Clerk.

And afterwards, to-wit, on Monday, the 17th day of January, 1898, the same being the 90th judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

*In the Circuit Court of the United States for the District
of Oregon.*

CHARLES ALTSCHUL,	}	No. 2,369.
vs.		
J. D. OSBORN.		
		Jan. 17, 1898.

Order Setting Motion to Amend Verdict for Hearing.

Now, at this day, on motion of Mr. C. E. S. Wood, of counsel for the plaintiff herein, it is ordered that the hearing of this cause upon the motion of said plaintiff for an amendment to the verdict heretofore rendered herein, be, and the same is hereby, set for Thursday, January 20, 1898.

And afterwards, to-wit, on Friday, the 21st day of January, 1898, the same being the 94th judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

*In the Circuit Court of the United States for the District
of Oregon.*

CHARLES ALTSCHUL,	}	No. 2,369.
vs.		
J. D. OSBORN.		
		January 17, 1898.

Order to Amend Verdict.

Now comes on to be heard the motion of the plaintiff to mold into form and amend the verdict rendered by the jury in the above-entitled case, and Mr. C. E. S. Wood and Mr. T. C. Dutro appearing in support of the motion, and Mr. S. T. Jeffreys and Mr. Will R. King appearing in opposition thereto, and the court having considered the record, the evidence, and the issues submitted and tried, and being fully advised in the premises, the said motion is allowed, and the clerk of this court is directed to enter said verdict in the following form and not otherwise: We, the jury duly impaneled to try the above-entitled case, find that the plaintiff is the owner in fee simple and entitled to the immediate possession of the premises described in the complaint, being the following described land, situate in the county of Malheur and State of Oregon, to-wit: The north half of section one, in township nineteen south, range forty-three east of the Willamette Meridian.

In the Circuit Court of the United States for the District of Oregon.

CHARLES ALTSCHUL,	}	January 21, 1898.
vs.		
J. D. OSBORN.		

Order Denying Motion for New Trial.

Now comes on to be heard the motion for a new trial in the above-entitled case, Mr. S. T. Jeffreys and Mr. Will R.

King appearing in support of the motion, and Mr. C. E. S. Wood and Mr. T. C. Dutro in opposition thereto, and the court being fully advised in the premises, the motion is denied; and, upon general consent of all counsel present, it is ordered that deficiencies in the record herein, caused by the disappearance of the pleadings from the courtroom, the clerk may be supplied from the office copies of counsel.

And afterwards, to-wit, on Monday, the 24th day of January, 1898, the same being the 96th judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

CHARLES ALTSCHUL,	} No. 2,369.
vs.	
J. D. OSBORN.	} January 24, 1898.

Order Extending Time to Submit Bill of Exceptions.

Now, at this day, on motion of Mr. S. T. Jeffreys, of counsel for the defendant, it is ordered that said defendant be, and he is hereby, allowed sixty days from this date in which to prepare and submit his bill of exceptions herein.

And afterwards, to-wit, on Wednesday, the 26th day of January, 1898, the same being the 98th judicial day of the

regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

CHARLES ALTSCHUL,	} No. 2,369.
vs.	
J. D. OSBORN.	} January 26, 1898.

Judgment.

This cause having been heretofore tried before the Honorable Charles B. Bellinger, and a jury duly impaneled and a verdict duly rendered in favor of the plaintiff, now comes the plaintiff by Mr. C. E. S. Wood, his attorney, and moves the court for judgment on the verdict: "We, the jury, duly impaneled to try the above-entitled case, find the plaintiff is the owner in fee simple and entitled to the immediate possession of the premises described in the complaint, being the following described land situate in the county of Malheur and State of Oregon, to-wit, the north half of section one, in township nineteen, south range forty-three, east of the Willamette Meridian." Whereupon, it is hereby adjudged that the plaintiff, Charles Altschul, is the owner in fee simple and entitled to the immediate possession of the north half of section one in township nineteen, south range forty-three, east of the Willamette Meridian, being the land described in the complaint herein and situate in Malheur County, Oregon, and that execution issue to dispossess the defendant

of said premises and to restore the plaintiff to the possession thereof, and it is further adjudged that the plaintiff have and recover from the defendant his costs and disbursements herein, and that execution issue therefor.

And afterwards, to-wit, on the 26th day of January, 1898, there was duly filed in said court a cost-bill, in words and figures, as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

CHARLES ALTSCHUL,

vs.

J. D. OSBORN,

Plaintiff,

Defendant.

No. 2,369

Jan. 26, 1898.

Cost Bill.

Statement of disbursements claimed by the plaintiff in the above-entitled cause, viz:

Clerk's fees.....	\$ 21.90
Marshal's fees
Costs in State Circuit Court.....
Attorneys' fee	20.00
Attorney's fee for taking.....depositions, at \$2.50 each
Depositions
Examiner's fees
Referee's fees

Witness' fees: Mitchell, 2 da., 1 m., 3.10; Gradon, 2	
day, 16 m., 4.60; Henderson, 2 da., 52 m., 8.20;	
Thurston, 2 day, 500 m., 53.00.....	78.90
Meals for jury.....	5.00
Total taxed at.....	125.80

The witness fees charged above are allowed, the objections of the defendant notwithstanding.

J. A. SLADEN,
Clerk.

Portland, Ore., Feb. 16, 1898.

J. A. SLADEN, Clerk.

By G. H. Marsh, Deputy.

District of Oregon—ss.

I, C. E. S. Wood, being duly sworn, on my oath say that I am one of the attorneys for the plaintiff in the above-entitled cause; that the disbursements set forth herein have been actually and necessarily incurred in the prosecution of this suit; and that said plaintiff is entitled to recover the same from the defendant, as I verily believe.

C. E. S. WOOD.

Subscribed and sworn to before me this January 26, 1898.

J. A. SLADEN, Clerk.

By G. H. Marsh, Deputy Clerk.

Filed January 26, 1898. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 11th day of March, 1898, there was duly filed in said court a petition for writ of error, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

J. D. OSBORN,

Defendant and Plaintiff in Error,

vs.

CHARLES ALTSCHUL,

Plaintiff and Defendant in Error.

Petition for Writ of Error.

And now comes J. D. Osborn herein and says that on or about the 21 day of January, 1898, this Court made and entered two certain orders, and on or about the 26 day of January, 1898, this Court made and entered a certain judgment, in favor of the said plaintiff and defendant in error, and against the said defendant and plaintiff in error, in which orders and judgment and proceedings had thereto in this cause certain errors were committed, to the prejudice of this defendant and plaintiff in error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant and plaintiff in error prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the 9th Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in the cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

KING & SAXTON and S. T. JEFFREYS,

Attorneys for Defendant and Plaintiff in Error.

Filed Mar. 11, 1898. J. A. Sladen, Clerk U. S. Circuit Court, District of Oregon.

And afterwards, to-wit, on the 11th day of March, 1898, there was duly filed in said court assignments of error, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

J. D. OSBORN,	}
Defendant and Plaintiff in Error,	
vs.	
CHARLES ALTSCHUL,	}
Plaintiff and Defendant in Error.	

Assignment of Errors.

The defendant in this action, in connection with his petition for writ of error, makes the following assignment of errors:

This is an action to recover the possession of certain real property in the State of Oregon. The complaint alleges that plaintiff is the owner in fee simple and entitled to the possession of the land in controversy, and that defendant wrongfully withholds the same.

All of which are denied by the defendant's answer.

Title I of chapter IV of the Code of Civil Procedure of Oregon prescribes the mode of bringing and conducting actions of that character.

Section 320 of said title (Hills' Annotated Code) is as follows:

"320 (317). The jury by their verdict shall find as follows: 1. If the verdict be for the plaintiff, that he is entitled to the possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his estate in such property, part thereof, or undivided share or interest in either, as the case may be.

"2. If the verdict be for the defendant, that the plaintiff is not entitled to the possession of the property described in the complaint, or to such part thereof as the defendant defends for, and the estate in such property, or part thereof, or license or right to the possession of either, established on the trial by the defendant, if any, in effect as the same is required to be pleaded."

The action was tried before the Court and a duly impaneled jury at the October, 1897, term. The jury on the 29th day of December, 1897, found and returned into court the following verdict:

In the Circuit Court of the United States for the District of Oregon.

"CHARLES ALTSCHUL,

Plaintiff,

vs.

J. D. OSBORN,

Defendant.

“We, the duly impaneled jury in the above-entitled action, find a verdict for the plaintiff.

“C. V. KUYKENDALL,
“Foreman.”

Which verdict was thereupon received, filed, and entered of record, without any objection from plaintiff; his attorney being present in the court at the time.

On January 5th, 1898, the defendant filed the following motion for a new trial and arrest of judgment:

In the Circuit Court of the United States for the District of Oregon.

“CHARLES ALTSCHUL,	} Plaintiff,
vs.	
J. D. OSBORN,	} Defendant.

“Comes now the defendant by his attorneys of record and moves the Court for an arrest of judgment and that the verdict in the above-entitled cause be set aside and a new trial granted for the following causes materially affecting the substantial rights of the defendant:

“1. The verdict of the jury in the above-entitled cause is uncertain, irregular, insufficient, and does not determine the issues of the cause.

"2. Insufficient evidence to justify the verdict.

"WILL R. KING and S. T. JEFFREYS,

"Attorneys for Defendant."

On the 7th day of January, 1898, the plaintiff filed the following motion to amend the verdict:

In the Circuit Court of the United States for the District of Oregon.

"CHARLES ALTSCHUL,

Plaintiff.

vs.

J. D. OSBORN,

Defendant.

"The above-named plaintiff by his attorney moves the Court for an order nunc pro tunc to amend the verdict in the above-entitled cause to conform to the issues made by the pleadings, evidence, and manifest intention of the jury, so that it shall read as follows: We, the jury in the above-entitled cause, find that the plaintiff is the owner in fee simple and entitled to the immediate possession of the following described land, situate in the county of Malheur and State of Oregon, to-wit: The north half of section one, in township nineteen, south of range forty-three, east of the Willamette Meridian.

"WILLIAMS, WOOD & LINTHICUM,

"Attorneys for Plaintiff."

On the 21st of January, 1898, the plaintiff's said motion to amend the verdict and the defendant's said motion

for arrest of judgment and a new trial were heard by the Court, the jury not being present, but having been discharged on the 29th day of December, 1897.

On the said 21st day of January, 1898, the Court made and entered the following orders:

In the Circuit Court of the United States for the District of Oregon.

“CHARLES ALTSCHUL,

Plaintiff,

vs.

J. D. OSBORN,

Defendant.

“Now comes on to be heard the motion of the plaintiff to mold into form and amend the verdict rendered by the jury in the above-entitled case, and Mr. C. E. S. Wood and Mr. T. C. Dutro appearing in support of the motion, and Mr. S. T. Jeffreys and Mr. Will R. King appearing in opposition thereto; and the Court having considered the record, the evidence and the issues submitted and tried, and being fully advised in the premises, the said motion is allowed, and the clerk of this court is directed to enter said verdict in the following form and not otherwise: ‘We, the jury duly impaneled to try the above-entitled case, find that the plaintiff is the owner in fee simple and entitled to the immediate possession of the premises described in the complaint, being the following de-

scribed land, situate in the county of Malheur and State of Oregon, to-wit: The north half of section one in township nineteen, south of range forty-three, east of the Willamette Meridian.”

In the Circuit Court of the United States for the District of Oregon.

“CHARLES ALTSCHUL,

Plaintiff,

vs.

J. D. OSBORN,

Defendant.

“Now comes on to be heard the motion for a new trial in the above-entitled case, Mr. S. T. Jeffreys and Mr. Will R. King appearing in support of the motion, and Mr. C. E. S. Wood and Mr. T. C. Dutro in opposition thereto, and the Court being fully advised in the premises, the motion is denied.”

On the 26th day of January, 1898, the Court rendered the following judgment upon the said verdict as amended by the Court:

*In the Circuit Court of the United States for the District of
Oregon.*

“CHARLES ALTSCHUL,

Plaintiff,

vs.

J. D. OSBORN,

Defendant.

“This cause having been heretofore duly tried before the Honorable C. B. Bellinger and a jury duly impaneled, and a verdict duly rendered in favor of the plaintiff, now comes the plaintiff by Mr. C. E. S. Woods, his attorney, and moves the Court for judgment on the verdict: ‘We, the jury in the above-entitled cause, find that the plaintiff is the owner in fee simple and entitled to the immediate possession of the following described land, situate in the county of Malheur and State of Oregon, to-wit: The north half of section one, in township nineteen, south of range forty-three, east of the Willamette Meridian.’

Whereupon it is hereby adjudged that the plaintiff, Charles Altschul, is the owner in fee simple and entitled to the immediate possession of the north half of section one in township nineteen, south of range forty-three, east of the Willamette Meridian, being the land described in the complaint herein and situate in Malheur County, Oregon, and that execution issue to dispossess the defendant of said premises and to restore the plaintiff to

the possession thereof, and it is adjudged that the plaintiff have and recover from the defendant his costs and disbursements herein and that execution issue, therefor."

And said defendant avers:

1. That said Court erred in making and entering the order of date January 21, 1898, attempting to amend the said verdict rendered by the said jury Dec. 29th, 1897, and allowing the plaintiff's motion to amend said verdict, and for not denying said plaintiff's motion to amend said verdict.

2. The Court erred in making and entering said order of January 21, 1898, denying the defendant's motion for arrest of judgment and for a new trial, and for not sustaining the defendant's said motion and granting him a new trial.

3. The Court erred in rendering the judgment January 26, 1898, in favor of the said plaintiff, Charles Altschul, and against the defendant, J. D. Osborn, upon the alleged amended verdict, and for entering any judgment at all in favor of the plaintiff and against the defendant.

KING & SAXTON and S. T. JEFFREYS,
Attorneys for Defendant and Plaintiff in Error.

United States of America, }
County of Multnomah, } ss.
District of Oregon. }

Service of a true copy of the original is accepted this 10th day of March, 1898.

C. E. S. WOOD,
Attorney for Plaintiff and Defendant in Error.

Filed Mar. 11, 1898. J. A. Sladen, Clerk U. S. Circuit Court, District of Oregon.

And afterwards, to-wit, on Friday, the 11th day of March, 1898, the same being the 136th judicial day of the regular October term of said court—present, the Honorable WILLIAM B. GILBERT, United States Circuit Judge, presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

J. D. OSBORN,

Defendant and Plaintiff in Error,

vs.

CHARLES ALTSCHUL,

Plaintiff and Defendant in Error.

Order Fixing Amount of Bond.

This cause came on for hearing on the application of J. D. Osborn, defendant above, to the Court to fix the amount of the bond to be given by the defendant, J. D. Osborn, for appeal of this cause, and the Court upon consideration thereof fixes the amount of the bond to be given by the said defendant upon appeal of the said cause at the sum of two hundred and fifty dollars.

Portland, Oregon, March 11, 1898.

WM. B. GILBERT,

Judge.

Filed March 11th, 1898. J. A. Sladen, Clerk U. S. Circuit Court, District of Oregon.

And afterwards, to-wit, on the 30th day of March, 1898, there was duly filed in said court a bond on writ of error, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

J. D. OSBORN,
Defendant and Plaintiff in Error,

vs.

CHARLES ALTSCHUL,
Plaintiff and Defendant in Error.

Bond on Writ of Error.

Know All Men by These Presents, that we, J. D. Osborn, as principal, and A. W. Glenn and S. V. Hess, as sureties, are held and firmly bound unto Charles Altschul, defendant in error, in the sum of two hundred and fifty dollars, to be paid to the said Charles Altschul, his executors or administrators. To which payment, well and truly made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated March 22nd, 1898.

Whereas the above named J. D. Osborn has obtained his writ of error and filed the same in the United States

Circuit Court of Appeals for the Ninth Circuit, to reverse the orders and judgment in the above-entitled cause by the Circuit Court of the United States for the District of Oregon.

Now, therefore, the condition of this obligation is such, that if the above named J. D. Osborn shall prosecute said writ of error to effect, and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

J. D. OSBORN. [L. S.]

A. W. GLENN. [L. S.]

S. A. HESS. [L. S.]

Signed, sealed, and delivered in presence of:

W. E. LEES.

United States of America, }
 District of Oregon. } ss.

I, A. W. Glenn, being duly sworn, depose and say that I am one of the sureties in the foregoing bond, that I am a resident and freeholder within said district, and that I am worth, in property situated therein, the sum of \$250.00 dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

A. W. GLENN.

Subscribed and sworn to before me this 22nd March, 1898.

[Seal] W. E. LEES,

Notary Public for Oregon.

United States of America, }
District of Oregon. } ss.

I, S. V. Hess, being duly sworn, depose and say that I am one of the sureties in the foregoing bond, that I am a resident and freeholder within said district, and that I am worth, in property situated therein, the sum of \$250.00 dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

S. V. HESS.

Subscribed and sworn to before me this March 22, 1898.

[Seal]

W. E. LEES,

Notary Public for Oregon.

This bond is approved.

(Signed) WILLIAM B. GILBERT,

Judge.

Filed March 30, 1898. J. A. Sladen, Clerk.

Clerk's Certificate to Transcript.

United States of America, }
District of Oregon. } ss.

I, J. A. Sladen, Clerk of the Circuit Court of the United States for the District of Oregon, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing pages, numbered from three to sixty-three, inclusive, contain a true and complete

transcript of the record and proceedings had in said court in the cause of Charles Altschul, plaintiff and defendant in error, against J. D. Osborn, defendant and plaintiff in error, as the same remain of record and on file in my office.

And I further certify that the cost of the foregoing transcript of record is eighteen and 80-100 dollars, and that the same has been paid by said plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court at Portland, in said District, this 8th day of April, A. D. 1898.

[Seal] J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

[Endorsed]: No. 465. In the United States Circuit Court of Appeals for the Ninth Circuit. J. D. Osborn, Plaintiff in Error, vs. Charles Altschul, Defendant in Error. Transcript of Record. In Error to the Circuit Court of the United States for the District of Oregon.

Filed April 11, 1898.

F. D. MONCKTON,
Clerk.

